(22)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 168

GUY CARLETON DENNEY, *Petitioner,*

vs.

THE FORT RECOVERY BANKING COMPANY,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING.

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To the Honorable Justices of the Supreme Court of the United States:

The petitioner respectfully presents his petition for rehearing:

NOTE: All emphasis within quotations in this petition is supplied.

I.

The petition for certiorari was denied on October 11, 1943. The petitioner does not know, and does not know how to find out, the reason why it was denied. Without such knowledge he presents his reasons why he prays that the denial be reconsidered and his petition granted.

II.

There Is But One Simple Issue and it is this:

If a farmer debtor requests the court to consent that he may redeem his farm under Section 75(s) before the expiration of the three-year period fixed by statute, and he fails to do so, may the court for such failure order it sold before the expiration of the three years? That is the only issue. We submit the lower court has no such authority. It violates not only the spirit but the letter of the statute. Its action amounts to judicial legislation—to judicial nullification of an act of Congress.

All other matters which have been discussed have been lugged into the case to hide the real issue.

The statute reads:

> "At the end of three years, or prior thereto, **the debtor may pay into court** the amount of the appraisal . . . " etc.

whereupon his farm is to be cleared of all liens. Section 75(s)(3).

This is a remedial statute. It must be liberally construed to preserve the farm and the home. As this Supreme Court has so aptly said in the Adair case "These provisions

look toward the maintenace of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy." To permit the decision of the lower court to stand is not only to permit it to be strictly construed but **to be misconstrued** so as to deprive the farmer of his home and **defeat the purpose of the Act.** It does not say anything about an **attempt** to pay, or a **promise** to pay.

This farmer debtor found that he was unable to raise the redemption money as he expected and before the date set by the court he notified the court of his inability and asked for the full three years.

The court then ordered him sold out for the sole reason that he did not redeem at the premature date.

That was the only ground for the order of sale and both the bankruptcy court and the Appellate Court expressly so declared. We quote from both courts. The finding of the bankruptcy court in its final order reads: "**The court finds that the time for redemption has expired, and said debtor has failed to so redeem said lands.**" R. 37, folio 35. **This is the only ground for the order.**

The appellate court in its opinion said: "**Since the appellant failed to redeem the property** by August 17, 1942, the appellee on September 18, 1942, filed its petition for an order of sale and for the appointment of a trustee therefor." R. 94, second full paragraph.

All other matters that have been brought into the record by (1) the respondent; (2) by the district court; and (3) by the appellate court serve only to confuse the issue. **That issue, we repeat, is merely whether under the statute mere consent to redeem without payment into court short-**

ens the period for redemption fixed by the statute. It can be so shortened only by amending the statute.

III.

The history of the farmer debtor law, Section 75 of the Bankruptcy Act, 11 U. S. C. 203, records a total failure and refusal of the federal courts in some sections of this country to execute the statute of the United States as expounded by this court. It is a sorry story, which is not applicable to any other law, of the persistency and enmity with which the defeat of this law has been pursued.

There is no exaggeration at all in stating that the statute is, by some, hated and mocked and every device that can be conceived of is employed to prevent its purpose being achieved. In some sections, the courts lend a hospitable ear to the creditor and turn a hostile ear to the farmer debtor. Equity and the purpose of the statute are given no consideration. **The harsh principles of forfeiture are employed.**

Counsel for the petitioner are well aware that denial of certiorari in a particular case is not to be construed as sustaining and approving the order which is involved. **But neither is it a disapproval or a reversal.** The order stands as a precedent to be eagerly cited as "certiorari denied" and followed. Denial of certiorari in a single case gives to the lower courts that have shown very little inclination to follow the equitable spirit of the law an excuse for annihilating, emasculating and destroying the statute and breaking down the salutory effects of the decisions of this court.

IV.

The opinions of the Seventh Circuit are replete with remarks and actions which are inconsistent with that "liberal construction" many times declared by this court to be required in administering Section 75 so as to accomplish its purpose.

> "Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. *John Hancock Mutual Life Ins. Co.* v. *Bartels*, [308 U. S. 180] at pages 186-187; *Borchard* v. *California Bank*, [310 U. S. 311], at page 317. There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. **Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (John Hancock Mutual Life Ins. Co. v. Bartels, [308 U. S. 380]; Kalb v. Feuerstein, [308 U. S. 433]) lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.**"

Wright v. *Union Central*, 1940, 311 U. S. 273, 279 and 280. Followed and quoted in *Wright* v. *Logan*, 1942, 315 U. S. 139, 141 and 142. See also *Mangus* v. *Miller*, 1942, 317 U. S. 178, last paragraph on p. 181. Applied to this Denney case these declarations by this court mean that the farmer debtor is entitled to have his full measure of relief, that is he is entitled to a three-year stay.

The farmer debtor under Section 75 has always had hard sledding in the Seventh Circuit. A few examples follow:

1. The farmer's difficulty in that circuit has not arisen out of any antipathy to the principle of the national debtor legislation, but rather due to bias against farmer debtor legislation, the Seventh Circuit Court, unconsciously, we believe, has assumed to repeal acts of Congress by judicial annulment. In the year 1935 the Seventh Circuit threaded a veritable maze of factual and legal difficulties to uphold the extension of the right of redemption against foreclosure given to corporations by Section 77B, while at the same time it held a similar extension of the right of redemption against foreclosure given to farmers by Section 75 to be unconstitutional. See *Cook County* v. *Straus*, also cited as *In re Argyle-Lake Shore Bldg. Corporation*, CCA 7, 1935, 78 Fed. (2d) 491, and *Lafayette Life Ins. Co.* v. *Lowmon*, also cited as *In re Lowmon*, CCA 7 1935, 79 Fed. (2d) 887.

2. Although this court in *Wright* v. *Vinton*, 1937, 300 U. S. 440, at 454, expressly cited the case, which has just been referred to, that is *Lafayette* v. *Lowman*, CCA 7 1935, 79 Fed. (2d) 887, as one of the decisions holding the extension of the right of redemption for farmers in Section 75 to be invalid, and overruled it, the Seventh Circuit refused to acknowledge it. On the contrary in *In re Wright*, CCA 7 1937, 91 Fed. (2d) 894, it said: "We do not understand that the question in the *Lowmon* case was before the Supreme Court in the *Wright* case." This court reversed that decision also in *Wright* v. *Union Central*, 1938, 304 U. S. 502. Later, in *In re Monjon*, also cited as *Monjon* v. *Equitable Life*, CCA 7 1940, 113 Fed. (2) 535, the Seventh Circuit stated that it had "learned from subsequent rulings of the Supreme Court in *Wright* v. *Vinton*, 300 U. S. 440 and *Wright* v. *Union Central*, 304 U. S. 502, and other cases that the holding in the *Lowmon* case was erroneous." But of course Lowmon lost her farm!

3. In *Wright* v. *Union Central*, CCA 7 1939, 108 Fed. (2d) 361, when deciding a case under the last sentence of Section 75(s)(3) providing that "the court **may**" liquidate a farmer debtor's estate under certain conditions (defined by this court in *Wright* v. *Union Central*, 1940, 311 U. S. 273, at page 281, as "certain contumaceous conduct") the Seventh Circuit held that non-payment of rent "not only authorized the entry" of an order of liquidation but **"made such action imperative"** citing *Wright* v. *Vinton*, 300 U. S. 440, which bears no such construction. This court reversed that decision also in *Wright* v. *Union Central*, 1940, 311 U. S. 273.

4. In *In re Leinweber*, also cited as *Leinweber* v. *Federal Land Bank*, CCA 7 1938, 95 Fed. (2) 240, the Seventh Circuit held that the statutory provision in Section 75 (s)(5) that a dismissed farmer debtor proceeding **"shall be promptly reinstated"** means that **"the farmer debtor shall promptly apply to the court for reinstatement"** and decided the case wholly upon the farmer debtor's failure to promptly make application for reinstatement. Other circuits hold, and this court has also held, that the rights accruing to farmer debtors do not depend upon diligence by the debtor. See *Cohan* v. *Elder*, CCA 9 1940, 112 Fed. (2) 967 and *Wright* v. *Logan*, 1942, 315 U. S. 139, 141.

5. In *In re Lowman*, also cited as *Lowman* v. *Federal Land Bank*, CCA 7 1939, 107 Fed. (2) 540, the farmer debtor was able to pay into court the appraised value of his farm but no more. The appellate court put the issue very clearly in the words:

> "The debtor-appellant contends that he has an absolute right during, or at the close of the moratorium period, to purchase the property at its appraised value, and that no other disposition of the property may be

made which would interfere with his right to purchase."

The Seventh Circuit denied this contention. It held that the creditor's right to a public sale at which he could bid his mortgage claim, and thus fix the redemption value at the amount of the mortgage and put it beyond the reach of the farmer debtor, defeated the right of redemption.

This court denied certiorari at 309 U. S. 680; denied a petition for rehearing at 310 U. S. 656; and denied a second petition for rehearing at 311 U. S. 724. Certiorari was later granted on the same question from the same Seventh Circuit in *Wright* v. *Union Central*, 1940, 311 U. S. 273, and the lower court was reversed, thus sustaining the original contention of the petitioning farmer debtor Lowman. But of course, in the meantime, Lowman irretrievably lost his farm by the unlawful orders on which certiorari was denied.

6. In *In re Moon*, also cited as *Moon* v. *Union Central*, CCA 7 1939, 107 Fed. (2d) 545, the Seventh Circuit made the farmer debtor's right to redeem at the value of his farm to be conditioned upon approval by the mortgage holder, that is, it gave a power of veto to the secured creditor! This court again denied certiorari at 310 U. S. 624; denied rehearing at 310 U. S. 658; and denied leave to file a second petition for rehearing, also at 310 U. S. 658.

As in the *Lowman* case although certiorari was later granted on the same question in *Wright* v. *Union Central*, 1940, 311 U. S. 273, of course Mr. Moon's farm by that time was lost to him!

7. In *In re Wilson*, also cited as *Wilson* v. *Louisville Joint Stock Land Bank*, CCA 7 1939, 105 Fed. (2d) 302,

the Seventh Circuit refused to recognize payment of the $100 balance of a rental instalment tendered after an order of dismissal although the farmer debtor had before dismissal tendered the check from which the $100 was realized. It seized upon the unfortunate Note 6 in *Wright* v. *Vinton,* 300 U. S. 440, 462, (later repudiated in *John Hancock* v. *Bartels,* 308 U. S. 180, 184), as its authority for upholding dismissal. The *Wilson* decision of the Seventh Circuit was overruled when this court reversed it again in *Wright* v. *Union Central,* 1940, 311 U. S. 273, for denying a farmer debtor the right to redeem for non-payment of rental. But again the farmer lost his farm by an unlawful dismissal!

8. In *In re Monjon,* also cited as *Monjon* v. *Equitable Life,* CCA 7 1940, 113 Fed. (2d) 534, the Seventh Circuit was impelled to follow the 1940 Borchard decision of this court in 310 U. S. 311, and declare an order of sale invalid because the prescribed statutory procedure had not been observed by the court, but, it espoused an "equivalent" theory, later repudiated in *Wright* v. *Logan,* 1942, 311 U. S. 139, another Seventh Circuit case, and **refused to give her a three-year stay, saying:**

> "We merely hold that she is entitled to an opportunity to pay the appraised value of her property into court, or, if the appellee demands it, a public sale" . . .

Again giving the creditor a power of veto!

9. In the farmer debtor case of *In re Pramer,* also cited as *Pramer* v. *Sharon Bank,* CCA 7 1942, 131 Fed. (2d) 733, the Seventh Circuit said: "Our experience in proceedings of this kind makes us skeptical as to when, if ever, the terminal is reached."

10. In this case, *Denney* v. *Fort Recovery Bank*, CCA 7 1943, 135 Fed. (2d) 184, the Seventh Circuit said:

> "We think the appellant voluntarily, knowingly, and advisedly consented to a procedure different from that laid down in the statute, and his conduct in this regard amounted to a waiver of his right to thereafter insist upon the letter of the statute."

That is, because the farmer debtor asked the bankruptcy court to consent to redemption before the three years was up and he was unable to make good because he could not raise the money, he can not have his full three years! We state again that **the farmer debtor Denney never agreed that in default of redemption at the premature date, the land was to be sold. That provision was grafted into an order approved by the respondent but not by the petitioner.** We cannot believe that the Supreme Court agrees with the district and circuit courts below that, because a farmer in good faith suggested and thought he could pay his creditors in less than three years, **he lost his right to a three year stay.** Neither the creditors nor the courts below can cheat the Frazier-Lemke Moratorium that easily. This court, we feel confident, will not put its stamp of approval on that procedure.

In *Borchard* v. *California Bank*, 1940, 310 U. S. 311, the farmer debtors and the mortgage holder consented in writing and the court upon their application ordered a procedure other than that in Section 75. This court held that such consent was not a waiver by the farmer debtors of and right under the statute. After the consent orders had been followed for four crop years they asked for the regular procedure as did Mr. Denney, the farmer debtor here. The bankruptcy court and the appellate court in the *Borchard* case and in this *Denney* case denied the farmer debtor's statutory right. There this court reversed the lower courts. Here it has denied certiorari.

V.

It seems difficult for some of the lower courts to comprehend and follow the repeated declarations of this court that the debtor has equal rights with the creditor to the consideration of the principles of equity and the purpose of Section 75. This court said in *John Hancock* v. *Bartels*, 308 U. S. 180, at 183 and 184:

> "We think that the District judge failed to follow the mandate of the statute. . . .
>
> Subsection (s) of Section 75 as amended by the Act of August 25, 1935, prescribes a definite course of procedure. That subsection applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts."

Pages 184 to 185: "**The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them the chance to seek an agreement with their creditors (subsection (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s).**"

Page 186: "Then it is provided, in paragraph (3), that at the end of the three-year period, or at any time before that, the debtor may pay into court the appraised value of the property. . . ."

Page 187: "The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved. See *Wright* v. *Vinton Branch, supra. Adair* v. *Bank of America*, 303 U. S. 350, 354-357; *Wright* v.

Union Central Life Insurance Co., 304 U. S. 502, 516, 517."

In *Borchard* v. *California*, 1940, 310 U. S. 311, at pages 316 to 317, this court declared:

"We are of opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of Section 75(s). That this is so is made plain by our decisions in *Wright* v. *Vinton Branch of Mountain Trust Bank*, (300 U. S. 440) and *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180. As was said in the latter case (p. 187):

'The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved.'

That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of a stay which will assure him of his possession for three years from the date of the order, upon the conditions mentioned in the Act."

Page 317: "Instead of prosecuting the cause before the Conciliation Commissioner pursuant to the debtors' petition, the bank resorted to a procedure not contemplated by the statute, evidently on the theory that it could obtain some advantage by that course."

It is the record of history that when a law is passed for the benefit of the great mass of the people, its effects

are gradually annihilated by nibbling at it in the lower courts, state as well as federal, until the static prejudices of those courts entirely defeat the law by judicial legislation. This is true even though a new social principle is embodied in a statute and established as the "supreme law of the land". If such a principle is beneficial to farmers or laborers, but is unfavorably regarded by those who are the beneficiaries of long established special privileges, unremitting diligence and consistency is required on the part of this court "lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act." *Wright* v. *Union Central*, 1940, 311 U. S. 273, 279. We think "eternal vigilance is the price of liberty" and without eternal vigilance Section 75 will continue to be mocked.

The most charitable way to put it is that it seems hard for some of the lower courts to understand that the debtor has rights equal in weight to those of creditors. "The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved. See *Wright* v. *Vinton* [300 U. S. 440]; *Adair* v. *Bank*, 303 U. S. 350, 354-357; *Wright* v. *Union Central*, 304 U. S. 502, 516, 517." Chief Justice Hughes in *John Hancock* v. *Bartels*, 1939, 308 U. S. 180, 187.

"We are of opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of Section 75(s). That this is so is made plain by our decisions in *Wright* v. *Vinton*

[300 U. S. 440] and *John Hancock* v. *Bartels*, 308 U. S. 180". Justice Roberts in *Borchard* v. *California Bank*, 1940, 310 U. S. 311, 316.

"This act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. *Wright* v. *Union Central* [304 U. S. 520], *John Hancock* v. *Bartels* [308 U. S. 180]; *Kalb* v. *Feuerstein*, 308 U. S. 433. Safeguards were provided to protect the creditors throughout the proceedings, to the extent of the value of the property. *John Hancock* v. *Bartels* [308 U. S. 180] at pages 186-187; *Borchard* v. *California Bank* [310 U. S. 311] at page 317. There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts and ambiguities in the Act be resolved in its favor and against the debtor." Justice Douglas in *Wright* v. *Union Central*, 1940, 311 U. S. 273, 278.

"Farmers can not be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes. *Cf. Borchard* v. *California Bank*, 310 U. S. 311. We think the *Bartels*, *Wright* and *Borchard* cases control our conclusion here" . . . Justice Black in *Wright* v. *Logan*, 1942, 315 U. S. 139, 142.

All the extraneous matters injected into this case by the respondent to bring confusion into the several opinions in the District Court, and into the opinion in the Appellate Court serve only to confuse and hide the real issue: **Did the failure of the farmer debtor to pay into court the value of the property as he thought he could do before the expiration of the three year stay empower the court to sell him out before the three year stay expired.**

VI.

But the national picture of the federal courts as a whole is not so black as that in the Seventh Circuit. In many circuits the spirit and purpose of Section 75 as determined by this court are faithfully followed.

For example we cite an opinion rendered within the past 30 days by a new judge in the Ninth Circuit. We refer to the case of *In re Loose,* D. Ct. California, dated September 28, 1943, reported in the Los Angeles Court Journal. The opinion is by Judge O'Connor until recently Comptroller of the Currency. There the conciliation commissioner issued an informal stay order which was never signed or entered. At the end of three years, during which the farmer debtor paid rental to the court, the mortgage holder sought the sale of the farm on the ground (1) that the farmer debtor had received the "equivalent" of a stay order, and (2) that he was "estopped" from claiming that no order had been entered.

The judge having no background of judicial bias or prejudice from the old conceptions of regular bankruptcy looked to the statute, to the decisions of this court and of the lower courts which have followed them, and to text discussions of the nature of court orders and of the office of referee in bankruptcy. He found that:

(1) Section 75(s)(1) provides that the court shall stay proceedings for three years.

(2) *Borchard* v. *California,* 1940, 310 U. S. 311, held that Section 75 provides an orderly procedure and the farmer debtor is entitled to compliance with that procedure. The unambiguous implication of this opinion requires a formal stay order to be entered.

(3) *John Hancock* v. *Bartels*, 1939, 308 U. S. 180, held that this orderly procedure includes the entry of a stay order which will assure the farmer debtor of his possession for three years.

(4) *Wright* v. *Union Central*, 1940, 311 U. S. 273, 279, held that the statute must be liberally construed lest its benefits be frittered away by narrow interpretations which disregard the letter and spirit of the Act.

(5) *Wright* v. *Logan*, 1942, 313 U. S. 139, 141, held that farmers can not be deprived of the benefits of the Act because the court believes they have already received its "equivalent."

(6) *Donald* v. *San Antonio Bank*, 1938, 100 Fed. (2d) 312, 314, held that the court in a farmer debtor case speaks only through an order signed and entered of record.

(7) *Paradise* v. *Federal Land Bank*, 1941, 118 Fed. (2d) 215, held that a bankruptcy court in a farmer debtor case may not enter a *nunc pro tunc* order.

(8) *In re J. & M. Doyle Co.*, CCA 3, 1942, 130 Fed. (2d) 340, 341, held that a verbal order is void because there is no record of it on which to rely to sustain it or oppose it.

(9) Remington on Bankruptcy states that referees act through orders and unless entered can not be reviewed.

This judge from his fresh review of the authorities concluded that "The three year stay period under Section 75(s)(1)(2) will not commence to run until a formal stay order is entered by the referee, as provided by said section."

CONCLUSION.

In short the Seventh Circuit has from the inception of the farmer debtor law repeatedly disregarded the letter and spirit of the statute; at the same time it enforced the spirit and purpose of the corporation debtor law; it has ignored the plain decisions of this court, being twice reversed on one point; its record of decisions under Section 75 stands out distinctly from the decisions of the other circuits of the nation; the farmer debtor in this instance, as generally in cases arising out of Section 75 in the Seventh Circuit, has been deprived of the benefits of Section 75 to which he is clearly entitled.

Only the corrective powers of this court will cause Section 75 to be observed in the Seventh Circuit.

Respectfully submitted,

Lima, Ohio
October 27, 1943

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Certificate of Counsel.

I certify that the foregoing petition for rehearing is filed in good faith and not for delay.

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